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No. 71-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS JUSTIN ORR,

Petitioner,

vs.

RAYMOND E. TRINTER, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents[1] pray that a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit be denied because the Judgment represents a correct application of the requirements of procedural due process to the narrow fact situation presented by this case.

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1. Raymond E. Trinter, The Columbus Public Schools, The Board of Education of the Columbus Public Schools, Harold H. Eibling, C. L. Dumaree, I. F. Young, Donald E. Calhoun, Paul R. Langdon, Mrs. Barbara S. Levenson, Thomas J. Moyer, Mrs. Virginia E. Prentice, Robert A. Ramsey, Walton H. Walker, and Howard C. Kuhnle.

OPINIONS BELOW

The opinion of the District Court (App. B of Petition) is reported at 318 F. Supp. 1041. The opinion of the Court of Appeals for the Sixth Circuit (App. A of Petition) is reported at 444 F. 2d 128.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a school board that permits a limited teaching contract held by a non-tenured teacher to expire in accordance with its terms and declines to enter into a new contract without affording the teacher a statement of reasons why a new contract is not offered and an opportunity for an evidentiary hearing denies the non-tenured teacher procedural due process absent a showing that the decision was based on impermissible constitutional considerations.

Whether or not the provisions of Section 3319.11, Ohio Revised Code standing alone violate the procedural due process requirements imposed by the Fourteenth Amendment Due Process Clause.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provision involved is Section 3319.11 of the Ohio Revised Code. It is printed in full in Appendix A, infra, pp. 13-15.

STATEMENT OF THE CASE

On the 23rd day of May, 1969, Thomas Justin Orr, (hereinafter referred to as "Petitioner") was employed by the Board of Education of the City School District, Columbus, Ohio, (hereinafter referred to as "Board of Education") under a limited teaching contract of 195 days duration to teach 10th grade English and History at Walnut Ridge High School, Columbus, Ohio, during the school year 1969-1970. (A. 19, 20)[2] Petitioner under the contract mentioned herein completed his first full year of teaching experience in Columbus Public Schools.

Petitioner holds a provisional teaching certificate issued by the Department of Education for the State of Ohio, which certificate permits him to teach the subjects English, History and Government in grades 7 through 12 in any school district in Ohio. (A. 21, 22)

On the 10th day of April, 1970, Petitioner was advised by the principal of Walnut Ridge High School that he would not recommend renewal of Petitioner's limited teaching contract for the year 1970-1971. Petitioner was advised that he could submit his resignation prior to the Board of Education notifying him formally, pursuant to Section 3319.11 of the Ohio Revised Code, that it would not renew his contract. (A. 16)

Following conferences with the school principal and Assistant Superintendent on April 10, 1970, and April 13, 1970; and following a public discussion at which Petitioner was present, the Board of Education by letter dated April 28, 1970, notified Petitioner that his limited teaching contract would not be renewed. (A. 23)

On May 1, 1970, and again on May 22, 1970, Petitioner requested a written statement of reasons why his contract had not been renewed.

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2. Reference is to the Appendix which was filed with the Sixth Circuit Court of Appeals.

No termination or interruption of Petitioner's limited teaching contract for the school year 1969-1970 occurred during the school year. (A. 18)

On the 5th day of June, 1970, Petitioner commenced the above case in the United States District Court for the Southern District of Ohio for a claimed violation of his civil rights under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. (A. 1) The Board of Education moved to dismiss this complaint. (A. 11)

The parties entered into a series of stipulations and the case was submitted to Judge Kinneary for his decision. (A. 12-18) On August 3, 1970, Judge Kinneary issued his opinion and order directing that:

> "(T)he defendants deliver to plaintiff's counsel a written statement of the reasons upon which the defendants relied in deciding not to renew plaintiff's limited teaching contract, that the defendants set a hearing date and cause notice of such date to be given plaintiff's counsel, that said notice advise plaintiff that at the hearing he will be given an opportunity to present evidence relating to the reasons given for the decision not to renew his limited teaching contract and that within fifteen days of the hearing the defendants advise plaintiff of its decision." 318 F. Supp. at 1046.

On the 10th day of August, 1970, the Board of Education filed its Notice of Appeal from the above order and pursuant to Rule 8 of the Federal Rules of Appellate Procedure, F.R.A.P. Rule 8, 28 U.S.C.A. sought a stay of execution of this order initially from District Judge Hogan and ultimately Circuit Judge Peck. The stay was granted by Judge Peck on the 20th day of August, 1970.

On the 16th day of June, 1971, the Sixth Circuit Court of Appeals filed its decision reversing the order of the

District Court issued August 3, 1970. In that opinion the Court concluded:

> "In the present case Orr (Petitioner) seeks to persuade this Court to render a decision which would confer certain tenure privileges upon non-tenured teachers—in effect to amend the Ohio statute by judicial decree. This we decline to do." (App. A of Petition, p. 29)

In substance, as demonstrated by the stipulations entered into by the parties to this case, (A. 12-18) no question with respect to the violation of First Amendment rights, or any other right guaranteed by law or the Constitution exists in this case. The case resolves itself into a pure question with respect to the Constitutionality of Section 3319.11 of the Ohio Revised Code.

ARGUMENT

The procedural due process issue involved in the present case is very narrow, and because of the very limited focus of the issue and the case, review by this Court on certiorari is not warranted. The validity of this assertion is ably demonstrated by the opinion of the Circuit Court. (App. A. of Petition, p. 18)[3]

The case does not concern itself with any infringement of a right guaranteed by law or the Constitution; further, as is demonstrated by the opinion of the Circuit Court, it does not involve the question of re-employment. (App. A. of Petition, p. 24)

Reduced to its simplest terms, this case presents a classic example of the situation in which one of two contracting parties decided not to enter into a further

3. This conclusion is further substantiated when the analysis by the Sixth Circuit Court in this case is compared with the careful analysis in *Tichon v. Harder*, 438 F. 2d 1396. The factual similarities and conclusions with respect to procedural due process are compelling.

contract of employment after the first contract expired strictly in accordance with its terms.

What Petitioner really seeks is for this Court to exercise its certiorari jurisdiction for the purpose of examining a peripheral issue raised before the Sixth Circuit Court of Appeals by way of a Motion and Affidavit to advance this case for hearing.

In essence, this Court is being faced with wholesale requests to expand the concept of procedural due process announced by the *Goldberg v. Kelly*, 397 U.S. 254, line of authority. The result is a molding of the Due Process Clause and procedural due process into a sterotyped formalism devoid of any real constitutional content or meaning.

Within the narrow framework of facts presented for review by the Circuit Court, the decision it reached is in perfect harmony with this Court's decisions in *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F2d 46, *aff'd* 341 U.S. 918; *Vitarell v. Seaton*, 359 U.S. 1; *Nelson v. Los Angeles County*, 362 U.S. 1 and *Cafeteria Workers Union, Local 473 v. McElroy*, 376 U.S. 886.

The Circuit Court's decision with respect to the alleged violation of the Due Process Clause supports the conclusion asserted herein, namely, that this specific case does not present a fact situation warranting the granting of certiorari:

> ". . . He argues that the refusal to rehire him without giving any reasons was arbitrary and capricious action, thus violating his substantial rights under the Fourteenth Amendment due process clause. We reject this argument for two reasons.
>
> "First, the Fourteenth Amendment only protects against the State depriving one of life, liberty, or

property without due process of law. 'It has been held repeatedly and consistently that Government employ is not "property." . . . We are unable to perceive how it could be held to be "Liberty." Certainly it is not "life." ' *Bailey v. Richardson*, 182 F. 2d 46 (D.C. Cir.), *aff'd by an equally divided Court*, 341 U.S. 918.

"Second, in the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him. A non-tenured teacher's interest in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers. The Board is not a legal tribunal. . . ." (App. A of Petition, p. 27)

On the fact situation presented the decision of the Sixth Circuit Court of Appeals is manifestly correct. No important question relating to the denial of procedural due process, requiring review and a decision by the Court is presented.

I

THERE IS NO CONFLICT OF DECISION

In view of the facts which gave rise to the instant case, and the narrow procedural due process issue which arose out of those facts, it cannot be said that a true conflict of decision exists between the conclusions reached by the Sixth Circuit Court of Appeals in the instant case and the conclusions reached by the other Circuits, as those conclusions and decisions apply to the very narrow proposition decided in the present case. In other words, this case presents a fact situation in which there is a total absence of any evidence demonstrating the abridgment of any right guaranteed by law or the Constitution. (A. 12-18 and App. B of Petition, p. 32).

On the very limited issue presented, the decision of the Sixth Circuit is in harmony with that group of cases represented by *Parker v. Board of Education of Prince George's County*, 348 F.2d 646, *cert. denied* 382 U.S. 1030 (1966); *Freeman v. Gould Special School District*, 405 F.2d 1153 *cert. denied* 396 U.S. 843; *Jones v. Hopper*, 410 F.2nd 1323 *cert. denied* 397 U.S. 991; and *Thaw v. Board of Instruction*, 432 F.2d 98.[4]

The case of *Roth v. Board of Regents*, 310 F. Supp. 972, Seventh Circuit Court of Appeals Case No. 18490, decided July 1, 1971, should be considered as standing alone, since the Court, without providing a clear Constitutional basis for its conclusion, adopts a conclusion

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4. The conclusions reached by the highest Court of the several State jurisdictions which have considered the narrow question raised by this case are in harmony with the conclusions of the Circuit Courts. See *DeCanio v. School Comm. of Boston*, 260 N.E. 2d 676, *cert. denied*, 91 S. Ct. 925; *Griffin v. Board of Trustees of St. Mary's College*, 285 A. 2d 737 and *Munro v. Elk Rapids Schools*, 178 N.W. 2d 450.

wholly at variance with the conclusion reached by the Circuit Courts in the cases mentioned herein.[5]

The very narrow point raised and decided by this case does not present the type of conflict of decision which should warrant this Court granting certiorari.[6] The decision on this narrow proposition is in perfect accord with the weight of authority and the decisions of this Court. Adherence to the decision of the Sixth Circuit in this case will produce no volume of litigation. Adoption of the approach taken by the Seventh Circuit in the *Roth* case, *supra*, will produce a volume of litigation and chaos in the administration of local schools, colleges and universities, not to mention the many other areas of contract employment where such an approach has an equal application.

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5. When the opinion of the Seventh Circuit in the *Roth* case, *supra*, is compared with the opinion by the Sixth Circuit in the present case (See App. A of the Petition) the absence of Constitutional analysis is apparent. The absence of careful constitutional analysis is likewise apparent when the *Roth* case, *supra*, is compared with the analysis to be found in the *Tichon* case, *supra*, Note 3. Further, the Roth case should be compared with Professor Alexander M. Bickel's thesis set out in his recent work "The Supreme Court and the Idea of Progress: Harper and Rowe, (1970).

6. Compare the purported conflict of decision asserted in this case with the assertion made in *United States* v. *Coplon*, 185 F. 2d 629, *cert. denied* 342 U. S. 920 and *Coplon* v. *United States*, 192 F. 2d 749 *cert. denied* 342 U. S. 926.

II

THE NARROW QUESTION INVOLVED DOES NOT PRESENT AN UNRESOLVED LEGAL ISSUE

Apart from the *Roth* decision, *supra*, the cases representative of the decision reached by the Sixth Circuit Court of Appeals do not present a different understanding or application of this Court's decisions relative to procedural due process. The difficulty arises when Courts such as the *Roth* Court, attempt to expand without limitation this Court's pronouncements with respect to procedural due process. Lost is the careful distinction this Court made in the case of *Goldberg v. Kelly*, 397 U.S. 254, wherein this Court at page 264 of its opinion drew the following distinction:

> "Thus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." [7]

Thus, in cases such as the *Roth* case, *supra*, we are witness to the unwarranted expansion of procedural due process requirements established by cases such as the *Goldberg* case, *supra*.

In the majority of cases where the issue involved in this case has arisen the Courts have correctly applied this Court's pronouncements in *Goldberg*, *supra* and *Cafeteria Workers*, *supra*.

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7. See also footnote 10 of the majority opinion in the *Goldberg* case, *supra*.

The propostion was well stated by Mr. Justice Brennan in his dissent in *Nelson v. Los Angeles County*, 362 U.S. 1 at 16:

> "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a state to put its entire civil service on such a basis, if as a matter of internal policy it could stand to do so."

The apparent conflict arises not from different understandings of this Court's decisions, but from attempts to induce the Courts to render decisions conferring tenure by judicial decree. (App. A of the Petition, p. 29)

III

THIS CASE IS NOT RELATED TO PERRY v. SINDERMANN

Petitioner readily admits that *Perry v. Sindermann*, 430 F.2d 939, in which certiorari has been granted (91 S. Ct. 2226) involves an issue wholly apart from the narrow issue decided by the Sixth Circuit Court of Appeals in this case. In the *Perry* case, *supra*, the litigation, complete with allegations, centered around whether or not the teacher's First Amendment rights had been violated. No similar problem exists in the present case. (App. B. of Petition, p. 32)

Assertion of certiorari jurisdiction for the purpose of joining together for review a case involving questions of constitutionally impermissible considerations with a case where those same considerations have been stipulated not to exist is not warranted. The due process considerations in each case are entirely different.

The fact that both cases involve the Due Process Clause, absent more, is not, standing alone, a reason for granting certiorari. *Tichon v. Harder*, 438 F.2d 1396.

CONCLUSION

For the reasons set forth hereinabove, the petition should be denied.

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APPENDIX A

OHIO REVISED CODE

§3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superinten-

dent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed, re-

employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.